UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Nathanael M. Cousins, Magistrate Judge

VALAME,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. C 23-03018-NC
	)	
BIDEN, et al.,	)	
	)	
Defendants.	)	
_____	)	

San Jose, California
Wednesday, December 13, 2023

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 11:21 - 12:33 = 1 HOUR 12 MINUTES

APPEARANCES:

For Plaintiff:

4039 2nd Sreet
Palo Alto, California 94306
BY: VIKRAM VALAME, PRO SE

For Defendants:

Department of Justice
Civil Division
1100 L Street NW
Suite 11406
Washington, DC 20005
BY: ANDREW J. RISING, ESQ.

Transcribed by:

Echo Reporting, Inc.
Contracted Court Reporter/
Transcriber
echoreporting@yahoo.com

Wednesday, December 13, 2023 11:21 a.m.

P-R-O-C-E-E-D-I-N-G-S

--oOo--

THE COURT: We'll take your appearances here. One second.

THE CLERK: And calling civil 23-03018, Vikram Valame. Is that correct?

THE COURT: What's the correct pronunciation?

MR. VALAME: Vikram Valame.

THE COURT: Valame. Thank you.

THE CLERK: Versus Joseph Biden and others. Counsel -- or will the parties please state your appearances for the record?

MR. VALAME: I'm Vikram Valame representing myself.

THE COURT: Welcome.

MR. RISING: Andrew Rising from the Department of Justice representing the defendants, and my colleague Daniel Lauretano with the Selective Service, also (indiscernible).

THE COURT: Welcome to you both. Thanks for being here. And, Mr. Valame, thank you for being here.

All right. We were finishing some other case management conferences on the phone. That's why we started a little late. Thanks for your patience.

For logistics for the hearing, if you'll please do

speak into a microphone because we are making a recording of what's being said, both what you say and what I say. And if any party wishes to request a transcript from the hearing -- you're not required to. But if you seek a transcript, that transcript will come from the recording. So it's important that we have a good recording of what's said and not overlap with each other to the extent possible to aid in the creation of a good record.

And if at any point you can't hear me, also important, tell me to repeat myself or slow down so that you can hear what my questions or comments might be.

The two motions before the Court are plaintiff's motion for partial summary judgment on claims one through three. That's at docket 30. And the defendants' motion to dismiss or, in the alternative, motion for a summary judgment, that's at docket 38.

And there's a small detail which I'll get into, but not first, about if I were to grant defendants' motion. I think -- I believe that you'll tell me more about it. There's still an individual claim against Defendant Kett, K-E-T-T, that is not subject to the motion. But that's a detail we can get to.

So those are the issues presented to the Court today. All parties have consented to the jurisdiction of magistrate judge. So we have that jurisdictional threshold resolved.

But there is an important jurisdictional issue I want to ask you about first, and that's standing. Both parties referenced standing in your briefs. But even if you hadn't mentioned standing in your briefs, the Court has an independent duty and has to be satisfied that there's a case or controversy and that Article III standing, which has both a constitutional component and also prudential considerations, that not only is there an injury that's occurred -- that there's a violation that's occurred out there in the world, but that the plaintiff is the right person or -- and you are a person in this case -- sometimes there's an entity. But you're the right person to bring the claim that there's been an injury, but that that injury is concrete and particularized, that there's an injury in fact that has occurred, that there's causation, that the injury was caused by the defendant's conduct or omissions, that there's redressability, there's a likelihood that the injury that is asserted by the plaintiff will be redressed by the lawsuit. And then there's some additional prudential considerations all going to the idea that the Court does not rule on generalized grievances. There has to be a real case or controversy in order for the Court to take on a case, because the alternative is that there could be lots of theoretical arguments or abstract arguments between parties that maybe aren't even -- that may not be the right time or

the right person or the right Court. Doesn't mean that there's not a way to redress the problem. The question is, is the federal court the right court at the right time to address a harm that is raised in a lawsuit?

So I want to talk about that more first, because if the Court lacks -- if the plaintiff -- and the plaintiff is the one who comes to Court -- has the burden to establish standing to sue, if I'm not satisfied that there's standing to sue and I have jurisdiction to hear this case, then I won't reach all -- to any other arguments that the parties have raised in their briefs. At least I won't raise them -- I won't decide them until I'm satisfied that there is standing to sue.

And I'm going to talk a little more. Overlapping with that question of standing is -- and this goes to, I believe, the redressability and prudential concerns that are part of the standing analysis is a political question doctrine which overlaps with some jurisdictional issues of -- even, Mr. Valame, if there's a constitutional problem or an administrative procedure problem, a question presented is, is the court the right place to grant the remedy you seek, or is it somewhere different? And there's a number of cases in different contexts, not just about the Selective Service, but in different contexts where Courts have found, well -- even if I were to concede -- and I'm not conceding anything,

but even if I were to say I think there's a constitutional violation or a violation of the Administrative Procedures Act, in some circumstances, the Court has said, well, that is a problem that is redressable with the political branches, with the legislature, either the federal legislature or a state legislature, or both, or with the executive branch. It's something that should be addressed by the executive branch. You can go talk to the executive branch directly. They might give you relief. But for some types of controversies, the Court says we're not going to -- for some of these prudential concerns and redressability concerns, we're not -- even if I were to agree that there's a problem and that you're the right person who has the problem and the problem is now, we're not going to grant a remedy in this situation, other than to say you should take your concerns to the executive branch or you should take your concerns to the legislative branch, that they're in a position to do something about it. And maybe after you've talked further with them to address your concerns, maybe then would be the right time to come back to the Court and ask the Court to do something about it, that either, "No, I'm not going to do something about it," or, "The time is not right now until there has been a further effort through direct lobbying and addressing your concerns to those other branches of government before the Court is going to wade

into it."

So that's a lot of lead-in to this. But you have very thoughtfully already presented me many arguments on both sides on the issues of -- that are in your motions, the claims that are in your case, Mr. Valame, and the defenses that the government has raised.

But I do want to start with standing to see if there is a case or controversy here that I have power to rule on.

So, Mr. Valame, I want to address this to you. First thing, you're self-represented, although you've been extremely thorough in your papers. If you do have any questions for me procedurally, I want to answer them so that you're not being taken advantage of in any way in this case. And we also have a pro se help desk attorney, Haohao Song, on the second floor. And I think we've given you his phone number, but I wanted to see -- start by asking you, do you have any procedural questions for me about what we're doing today or in the case that I can answer for you?

MR. VALAME: Sure. Two things. First of all, I talked to the pro se help desk. They said they wouldn't represent me because they don't allow claims against the federal government at that help desk. That's what I was told when I talked to two employees at the court. So --

THE COURT: And there's -- I'm going to respond not by disagreeing, but just to understand more what you

were told. There is representation, and I understand that the -- and I'm not speaking about representation of somebody being an attorney for you, but just giving you advice procedurally about what to do. Did you speak with Mr. Song?

MR. VALAME: I called -- there's a pro se help desk number on the court's website.

THE COURT: Yes.

MR. VALAME: I called that. I explained my case to the person on the other line, and they said that they didn't offer help for my kind of case against the federal government. And then when I filed my case, I talked with the clerk at the desk, and she said, yeah, that that office doesn't represent claims against the federal government. So that's -- not represent, but give advice even.

Secondly, if -- so you brought up standing.

THE COURT: Yes.

MR. VALAME: I guess I would respectfully ask that if you're going to rule on standing or have serious concerns, I have an opportunity to file something extra on the issue because -- I guess, like, notice considerations, and I didn't raise it in my second brief because the government didn't make any arguments.

THE COURT: Yeah.

MR. VALAME: And I understand that you cannot waive standing, but --

THE COURT: You're right. So let me respond to those things. You're right. You can't waive standing. I'm raising it independently. Even if they made no mention of it and you made no mention of it, I would still raise the issue because it's still your burden to establish. And, yes, for purposes of due process and notice, and to have a full record, I would absolutely give you an opportunity to respond in writing after we have this conversation today and before I rule, and we can talk about how much time you need and what you have in mind. And the defendants too might have something that they want to say about standing, and they can tell me today. And if they wish to, they can give me something in writing, and we can talk about that. So, absolutely.

And I want to -- I'll look into this question about whether they can help you or not at the help desk because of the nature of your claims before I comment further on that. But I'm glad that you at least have the number and have responded so far.

So any other procedural questions?

MR. VALAME: Like, on standing, I guess -- again, this is more in the actual argument, but I think that I could have -- if I had the opportunity to amend my complaint, I think I would be able to further establish standing. That's because I recently filed two job

applications with the federal government, and I know -- I think 5 U.S.C. 3328 prohibits me from working in the executive branch if I haven't registered. And I think if the government denied my job applications on that basis or even just declared me unable to work for them, that would be also sex discrimination. That's, I think, very clearly an injury in fact. I don't think I need that, but I think it would help if you think the other two bases for standing are insufficient. So leave to amend, I guess, if you dismiss.

THE COURT: All right. I'm taking notes here that you're requesting leave to amend. As -- just to follow up and -- absolutely, if you were to file an amended complaint, these assertions would be in writing. But as to the job applications you've made, have you received responses to them, or it's an application at this point?

MR. VALAME: So I just had an interview with the Nuclear Regulatory Commission. They have a job in Maryland that I'm applying to. And I also submitted an application to the Defense Counterintelligence and Security Agency for an auditing position. I don't -- I haven't received a response for that as far as I'm aware, but I think they review them a bit later from what I've been told on their website.

THE COURT: Thank you. And speaking to applications -- this may be in the record, and I -- there's

many things in the record, so I may have missed it. It may be even in a complaint. Have you filed with the Selective Service? Or at this moment, have you not?

MR. VALAME: I'm not registered for the draft.

THE COURT: All right. And -- thank you. And I will give you a chance in writing to provide more information, but just to -- if you're prepared to address this question right now, what would you say is your concrete and particularized injury right now, even if I -- without need to -- for leave to amend?

MR. VALAME: Oh, yeah.

THE COURT: Maybe you've got it right now. So what's your concrete and particularized injury right now?

MR. VALAME: So there's two injuries that I have. First is the sex discrimination. The US Government has expressly threatened me with prosecution through several means. On their website which I accessed they said they'll prosecute me. The Department of Justice, the US attorney for this district says that he expects his office to comply with the act and says, you know, he's taking responsibility to enforce it. There is a case --

THE COURT: If I might ask, when they -- when you say they threatened to prosecute you, is it individualized to you, or they threatened to prosecute someone in the situation where they don't register?

MR. VALAME: Yeah, in the situation where they don't register. But I would also know, I think, Cal. Trucking Association v. Bonta 996 F.3d 644 says that if the government refuse to disavow enforcement of a challenged statute in litigation, that itself is "strong evidence of a credible threat of enforcement." The government has conspicuously not disclaimed enforcement in any of their briefing. So I think on that basis alone, you could decide the question.

Also, even if the threat of prosecution isn't going to happen, I think the fact that they've -- and so my second injury, I guess, has classified me on a sex discriminatory basis, in itself, injury. So Havens Realty, Allen v. Wright, the Supreme Court expressly said that where you have discriminatory classifications, that's an extremely severe injury, and that is sufficient for Article III standing, even where it does not directly impact life, liberty, or property. And I think you can kind of get that from the Constitution, because the Constitution says you can't be deprived of life, liberty, and property without due process. But it separately says you can't be discriminated against based on your sex. And it will be very odd to say the latter is identical to the former when they're separate provisions that presumably the Framers thought were doing separate work.

So -- yeah. And then I guess -- you know, there's other cases on the discriminatory injury theory. I guess -- in cases where plaintiffs have alleged discrimination and the Court has not found standing, it's usually been because the discrimination was against someone else. So I think in some stigmatic injury cases like Steffel v. Thompson maybe, like, some plaintiffs have complained that, you know, the federal government subsidizes discriminatory schools somewhere else, and that's a stigmatic injury on my entire race. The Court has said that's not sufficient because you are not the one being discriminated against. But I am being discriminated against, because the regulations say -- you know, I'm a male over 18. I'm required to register. That's a personalized injury to me. I am the one being discriminated against, not someone else in Maine or Hawaii who's being discriminated against.

So I think that's the only reason why the Court has denied standing in discrimination cases is that someone was complaining someone else was being discriminated. I guess I would also point out that plaintiffs in Rostker vs. Goldberg, the plaintiffs in the prior Selective Service case in the Ninth Circuit both demonstrated standing. And they had registered for the draft, so they weren't even subject to criminal prosecution. And the Courts nevertheless found standing both here and in the Fifth Circuit

THE COURT: Yes, I'm familiar with cases where a person who had registered was found to have standing both in the district and the decisions. And it seems like your situation is a little different from those cases in that you -- or it could be. Maybe it's not different. But factually, there's a difference in that you have not registered. So my thinking out loud is, all right, is your injury concrete now or is it still abstract? Because you have not -- you haven't registered, and maybe you'll never register. And in that situation -- and is your -- the threat of prosecution a generalized one, or is it particular to you in some way? That's what I'm trying to evaluate.

MR. VALAME: I would say that the fact that I haven't registered makes the threat even more credible, because the Supreme Court has said that -- yeah, this is Steffel v. Thompson. You don't have to subject yourself to criminal prosecution anyways to get standing. I could register and then sue and be in the same position. But I have subjected myself to prosecution, so the threat is even more credible now. And that further supports standing.

It's also -- it's concrete and particularized to me. I am subject to prosecution. Now, there might be other people subject to prosecution. I think maybe nine-percent of men have not registered according to the Selective Service. But that doesn't displace the fact that I'm subject to

prosecution. You know, if someone challenges a general statute on First Amendment grounds, they can challenge it even if the statute applies to lots of people. It can apply to everyone. There's still a concrete, particularized injury to the plaintiff.

And then -- again, same thing with the discrimination. I personally am subject to the classification. You know, if I was like a temporary immigrant, maybe I wouldn't have standing because I'm not included in the draft, but that's not the case. I'm subject to felony prosecution, $250,000 fine. You know, all their websites say they'll prosecute me. They haven't disclaimed it. I think that's sufficient.

THE COURT: And speak to redressability. The injury you've asserted, how will that be redressed through this lawsuit?

MR. VALAME: So two things. First of all, I think the Ninth Circuit has already ruled on redressability. That opinion isn't precedential, but I think this Court should be very hesitant about directly contradicting the Ninth Circuit in the same exact procedural posture.

Secondly, the Constitution is silent. The government can require women to register or strike down the registration requirement to men. But the important thing is that I -- my injury will be redressed either way. All this Court has to do is say the regulations are vacated. The

government can decide what to do. But either way, my injury will be redressed, because if both people have to register, then I'm not being discriminated against. No more injury. And I think that was the Court's rationale in the recent First Amendment case, National Association of Political Consultants vs. Barr, I want to say. The Court said, "The First Amendment injury is discrimination in speech. We're going to strike down the discriminatory requirement, the plaintiff still have standing, and we've redressed their injury." You know, the dissents had something else to say about that, but they were dissents.

THE COURT: All right. Thank you. Anything else you want to tell me now? And, again, we'll give you a chance to put the things in writing after today. But anything else that right now you would like me to consider in support of your standing to sue?

MR. VALAME: Yeah, one more thing. So TransUnion and Spokeo say that, you know, just being legally injured sometimes is insufficient to get standing. But TransUnion also has this quote, "Traditional harms may also include harm specified by the Constitution itself." So that's why you don't have to show further injury if your free speech or free exercise rights have been violated. And I think since the -- since, you know, for standing you assume that my legal arguments are correct, if you assume the Equal Rights

Amendment, the 28th Amendment, has been enacted, that's a specific legal right created by the Constitution itself, and that is always sufficient to confer Article III standing as long as, you know, I'm not -- I'm alleging injury to myself, my own rights. So the Constitution can create rights that are automatically enforceable, unlike statutory rights.

THE COURT: And why should I assume applicability of the Equal Rights Amendment to your situation? I know that your lawsuit is about that. But why at this procedural junction should I assume that that is -- that you win on that issue?

MR. VALAME: So for standing purposes, you assume the legal truth of the arguments presented. I don't have a case cite for that off the top of my head, but I know I've seen it in several cases. And that makes sense because -- otherwise, if you say, "Well, I don't have standing because the Equal Rights Amendment isn't ratified," you're just deciding the merits of the case. That's like, you know, 12(b)(6), not 12(b)(1).

So I would say, you know, if my legal argument -- my non-frivolous legal arguments are right, then I have injury. Now we go to the merits. And maybe, you know, like in a personal injury case, if I allege personal injury but fail to prove it, you know, you could say I lack standing because I wasn't injured. But that's a merits question.

THE COURT: All right. Thank you very much.

Mr. Rising, I want to get your weigh in on it now. Of course you didn't move under 12(b)(1) and -- but as Mr. Valame has noted, there can't be a waiver of the Article III standing. So does Mr. Valame have standing in this case? What do you recommend?

MR. RISING: Yeah, that's correct, your Honor. A lot of new information just came in about the job applications and things like that. I'll need to speak with my clients and those agencies before I can give a full answer on something like this, of course.

THE COURT: Yeah.

MR. RISING: But you're right. We have not moved to dismiss on standing grounds explicitly in the complaint, just based on what he has pled in the complaint. Factually, I think anything more would require a consultation with my clients. But we think this case is most easily resolvable in the way that other Courts who considered ERA cases -- Taylor v. El Centro, some of the cases we cited, have resolved this off the bat by just concluding that the ERA does not provide a basis for a federal claim. So I think that would be the cleanest and most straightforward way to look at this. It's the reason we didn't contest standing in the papers. But I understand you have an obligation to look at it as well. So if you require additional briefing, the

defendants are happy to provide it.

THE COURT: Yeah. On the issue of cleanest and efficiency, I'm going to segue, and I'll come back to the topic of more briefing on standing. Am I correct that if I were to grant your motion, docket 38, as far as cleanness goes, there would still be a slander claim remaining, which would be the individual claim against Kett?

MR. RISING: I believe plaintiff interpleading and then also with us he's conceded that claim would fail. So I would expect a voluntary withdrawal or a -- I think this Court has the power to dismiss it as well, because it would fail for the same reasons. But regardless, I think resolving the motions before you would resolve the entire case.

THE COURT: Yes. And I know Mr. Valame has said -- well, he doesn't want to have that part hanging over if I were -- if I granted your motion. But I haven't decided that question yet. I haven't decided the motion.

MR. RISING: Of course.

THE COURT: But it goes a little bit to the efficiencies of this. And if there's no standing, then I -- it's not a balancing test of deciding -- of what's efficient. It's just -- there's not standing. But I do want to be mindful of what's going to be next and when it's going to be.

All right. All right. So here's what I want to do on standing -- and I'll hear your other arguments here. You're here, and I appreciate you all being here and the preparation you've made for today's hearing.

Mr. Valame, how much time would you like to file a further brief and any information you would like to present in support of your standing to sue?

MR. VALMAE: So a brief, not an amended complaint.

THE COURT: If you wish to file amended complaint, you could do that. I'm not -- I haven't dismissed your current complaint or made a finding you don't have standing. So if I were to theoretically say that under your current allegations you lack standing, I might give you leave to amend. You've requested leave to amend. But before I do that, I'll give you a chance to present, on your current complaint, further argument in your brief.

MR. VALAME: Okay. I think that I could submit an amended complaint in a brief within seven days. Really, it's not that much. Just a few paragraphs and a few pages of standing argument. So seven days.

THE COURT: All right. And it could be that on the merits that you would -- you know, separate apart from standing, you might want to seek leave to amend your complaint. And so -- and, of course, the defense may have a view as to whether that should be granted or not. It's a

little bit of -- not unprecedented, but you've got on the defense side a motion to dismiss and/or a motion for a summary judgment. And on a motion to dismiss, there's a liberal standard for amendment. Not a limitless standard, but there's a liberal standard for amendment. If I were to rule on summary judgment that as a matter of law I'm dismissing the case, you can still have leave to amend in that circumstance. But oftentimes, the defendant will say, no, there should not be a leave to amend in that circumstance. But that does raise the issue of, well, should I wait? You know, if you are -- if you're telling me, Mr. Valame, that you really do want to amend your complaint -- and I don't know until I see your amended complaint what all you might be amending -- should we have the other arguments on the current complaint now, or should we sort of wait and see what you put in your amended complaint before we pick up the arguments?

MR. VALAME: So I don't want to delay decision in this case. If I amended my complaint, I think I would only add the job application arguments on standing and just clarify that. The merits would remain unchanged. And I do think that if this Court ruled against me on the merits, any amendment will be futile because the Fifth Amendment claims are foreclosed. If there's no 28th Amendment, there's no 28th Amendment.

THE COURT: Right.

MR. VALAME: And I'll just take an appeal.

THE COURT: Yeah. Thank you. All right. That gives me some clarity there.

All right. So, Mr. Rising, then as to when you would like to provide any more information and/or response on the standing arguments, what deadline would you request?

MR. RISING: Your Honor, I think it might depend on whether we're filing a new motion to dismiss and for summary judgment on a brand new complaint or not. But given the holidays -- I have another hearing in January as well. I think preferably four weeks after plaintiff's.

THE COURT: All right. How about we set -- so we request from Mr. Valame a further submission by December 20th, the date you suggested, you have a week. And how about we go January 12th for a response from the government?

MR. RISING: Sure.

THE COURT: Writing that down. And would you like to reply, Mr. Valame? I know it's a bit abstract until you see what their response is.

MR. VALAME: It is a bit abstract. I want to lean towards no because I'm not sure how much it would help the Court if I filed a reply brief, but, you know, if they make something I haven't thought of.

THE COURT: Yeah. Here's what I'll leave it at,

after you read their -- after you read the -- what they submit, if you seek leave to file a reply, I'm going to ask you to make that decision quickly, just so I know what you're doing. So I'll ask you by the 13th -- by the next day to either request leave to file a reply. And the answer is I'll likely give you leave to file a reply if you wish to. Or if you tell me you don't want to, then I'll know that you're -- don't wish to file a reply.

MR. VALAME: Yeah. I think I can file a request for reply the day after --

THE COURT: Yeah.

MR. VALAME: That's another week, yeah.

THE COURT: Just a one paragraph saying you have more you would like to say, or you don't have more you would like to say, and then I'll know that it's been submitted. And I don't anticipate having a need for a further hearing to talk about standing issues. I'll do it based on the papers is my expectation. But if I change my mind, then I'll let you know with reasonable notice that I want to reconvene for further conversation.

All right. This is all very helpful, and I thank you for your patience addressing standing. So that -- let's put that aside for the moment, and I will determine it before making a final decision, but we've got a process in place to figure it out.

All right. Mr. Valame, I'm going to have you go first on your motion. Now, you both got motion -- things you're asking for from the order, so I'll give you a full chance to argue these things. But you do have a motion for summary judgment as to the first three claims in your complaint. So I'll give you an opportunity to tell me why I should grant your motion, and then I'll have Mr. Rising address your arguments and what he disagrees with and his request for judgment on their claims. And then, Mr. Valame, I'll come back to you for your reply on your arguments, but also on his arguments, if that makes sense.

MR. VALAME: Yeah.

THE COURT: All right. Mr. Valame, you may stay there or come up to the podium, whichever is comfortable for you.

MR. VALAME: Thank you, your Honor. The defendants' position relies on the belief that text outside of Article V can amend Article V, and that position is untenable. Everyone agrees that the prefatory text of amendments does not become part of the Constitution of the United States. Every single amendment ratified, it's just the text. You don't see, you know, all or some of them in the Bill of Rights. You don't see any of the other proposing texts, any of the other amendments. And that makes sense. They're not part of the Constitution of the

United States.

However, defendants also concede in their OLC opinion that to amend the effect Article V has on amendments, you do have to include the text in the amendment. So take section three of the 28th Amendment. That includes a two-year grace period. The OLC acknowledges that without that text, Article V would say the amendment is ratified immediately. What the section three does is it amends Article V to change that aspect of the amendment.

And that is why the deadlines contained in the 18th to 22nd Amendments are all valid. When the amendment is ratified, the deadline immediately amends Article V and says -- and imposes an additional condition on ratification.

When the deadline is in the proposing clause of the amendment, it can't amend Article V. It has no legal force outside of what the Constitution allows Congress to specify. And Congress' power in that area is extremely limited. The Constitution says the one mode or the other. And the two modes are ratification by legislatures or ratification by Convention. It's difficult to imagine how the Constitution could have been clearer that Congress has only two options with amendment ratification procedures.

And I think, you know -- I'll address Dillon, which is their primary case. But I think it's worth thinking about what the consequences of the defendants' position is.

According to the defendants, Congress can impose any limit on ratification in the proposing clause of an amendment. Congress could say, "This amendment should be ratified when four-fifths of the states have ratified it. This amendment takes effect five years after ratification" in the proposing clause. That's one thing.

But, second, and maybe more importantly, according to the defendants, putting the deadline in the proposing clause allows Congress to amend it at its leisure by bare majorities without a presidential veto whenever Congress wishes. And that gives Congress enormous leverage over the ratification process. It essentially allows Congress to revoke the proposal of an amendment. If Congress proposes an amendment, the next Congress doesn't like it -- you know, scholars have all agreed that Congress can't revoke an amendment under Article V. But according to defendants, they could just impose a one-year deadline and make it impossible for the states to ratify.

THE COURT: Or one-day deadline.

MR. VALAME: Yeah. One-day deadline, one second deadline, whatever they want. And, again, no presidential veto, bare majorities in both houses of Congress. And they can do whatever they want. There's no reason why it's confined to a deadline. The Congress, if it sees an amendment nearing ratification, could say, "Well, we need

all 50 states to ratify this amendment for it to be valid."

THE COURT: Now, I imposed the question of a one-day -- but in this case, there's not a one-day deadline that Congress set. It was much -- something much more generous. And so to keep it tied to the facts of this case, in this situation with the deadline Congress set, why should I say that that was unreasonable, if that's the right standard?

MR. VALAME: So this Court shouldn't say the deadline is unreasonable, because in Coleman, the Court very clearly said that's not something Courts can do. Courts can't review Congress for reasonability.

THE COURT: Yeah.

MR. VALAME: What I'm asking this Court to do is to say that there are -- there is no deadline. It doesn't matter if it was 100-year deadline or one-day deadline, the deadlines or anything else in the proposing clause of an amendment, except a mode of ratification, the one or the other, is nothing. It's a nullity. It can't be enforced against Article V's clear text.

So I guess that brings us to Dillon, which is their best case, I would say. And I think Dillon was a case about the 18th Amendment. And it was really about facts of the ratification of the 18th Amendment. And I think you can see this in a lot of places in the Dillon opinion.

So you can start with the -- all right. So you could start with, you know, page 373 to 374. It says Congress has a wide range of power in proposing amendments, and it says,

> "The only limitations are the two-thirds requirement and the requirement that they can't destroy equal suffrage in the Senate."

Now, that only makes sense if you're talking about the content of proposed amendments. It's a very odd interpretation of the Court's ruling that we say Congress can do literally anything even outside the text of proposed amendments as long as it doesn't destroy equal suffrage in the Senate. And so that's one thing.

Second of all, page 371 of Dillon says,

> "The article says nothing about the time in which ratification may be had or that it must be had within some reasonable amount of time."

So the Court also says,

> "This is not an argument in -- from Article V in the deadline. It's something that Congress has put into the Constitution by ratifying this 18th Amendment with three-fourths of the states."

And then, again, on page 376, it says, "Every amendment has an implicit deadline." That was the centerpiece of the Court's ruling in Dillon. What Congress is doing, it is taking the deadline implicitly from the amendment and making it explicit, and then the states can ratify that deadline.

And then lastly, I would point you to the appellants brief in the case. That brief is very clear about what appellants are asking the Supreme Court to do in Dillon. They're saying the state legislatures had no power to ratify the 18th Amendment, because the 18th Amendment essentially coerced a ratification by making them do it too quickly. It says they violated state procedural rules in doing those ratifications. It says that Congress is destroying the federal structure of the United State by including this text in the proposed amendment. The entire brief is an attack on the content of the amendment. And in Dillon, the Court said, "No, you can't attack the content of an amendment. Congress has plenary power unless it destroys equal suffrage in the Senate." And I think, you know, that's also consistent with how later cases interpreted Dillon. So US v. Sprague, the Court says there are exactly two modes of ratification and Congress has exclusive discretion over those two modes only.

If Dillon really said that Congress can impose anything that doesn't violate, you know, the equal suffrage clause,

then that discussion in Sprague makes no sense, because Congress has exclusive power for, you know, really any condition provided that, you know, maybe the bare minimum there's three-fourths of the states still left to ratify it.

So, I guess the text the US relies on is this line, "We hold it's an incident to the power of Congress to designate the mode of ratification." And the government latches onto it. It says that its incident of a power designate the mode. "We always put the mode in the prefatory text. And therefore, this incident to the mode, it can also be in the prefatory text."

So there's a few arguments on that. First of all, I think that's reading that line for way more than it's worth in the Court's opinion. You know, we have -- the entire opinions about the content of amendments. And then it says Congress is competent to do this because they can recognize the political, social, and economic factors in amendment. So we hold it to incident to the power to designate the mode. So that same Congress has expertise in the area, so Congress can be trusted to make the decision. It's not saying Congress can be trusted to make the decision outside the safeguards of Article V.

And, you know, maybe this is an aside, but, you know, the government says Article V imposes a lot of safeguards on Congress. You shouldn't be so worried. Well, first of all,

the biggest safeguard of Article V is ratification by three-fourths of the states, which the government says it doesn't have to happen. Second of all, the government thinks that bare majorities in both houses of Congress can do whatever they want with amendments. The OLC has taken the position there's no presidential veto. It's bare majorities. And the OLC says it's the only time Congress can exercise power by bare majorities without any constraints. And that's really an extraordinary assertion. I mean, I have a lot more arguments. Are there any questions on this?

THE COURT: I do not so far.

MR. VALAME: Okay. So I would say that this text about the mode of ratification is pretty clearly, you know, dicta, and it's not even considered dicta -- that's, you know, very persuasive on the Court. It's really not about the mode power of ratification. It's just saying Congress has expertise in this area.

Next, even if you think Dillon said that Congress had the power incident to the mode and that really is incident to the mode in that Congress can put in the prefatory text, Dillon is almost certainly not good law on that aspect any more. The 27th Amendment -- you know, Dillon's analysis is it will be absurd if amendment stood for all time, because then you could ratify a Congressional Compensation

amendment. Well, guess what? That amendment was ratified. Congress approved it, I think, like 512 to three in both houses -- like, House was 414, three, Senate was unanimous. Everyone agrees the 27th Amendment is legitimate. And that takes the entire force of Dillon's reason, because Dillon said Congress' power to impose deadlines is merely the power to liquidate an already existing deadline. But there is no already existing deadline, there's nothing to liquidate. And therefore, the only rationale for Congress being able to impose deadlines is that Congress is merely proposing a deadline as part of the amendment. And when that amendment is ratified by three-fourths of the states, the deadline is valid, not because of Congress' power, but because it's part of the Constitution of the United States. And it's valid because the Constitution is sovereign.

So -- and, again, this goes back to section three of the 28th Amendment and the 20th Amendment. The deadlines -- or not the deadlines. The delays in effect -- those also amend Article V. It's the same rationale. If you want to change the effect of Article V, which is immediate validity when three-fourths of the states ratify, you have to amend Article V. And, you know, the Court said US v. Sprague that exact thing. It said, "If you want to change this, you know, single finely wrought ratification procedure, amend Article V." And that's what these other amendments do. The

US says you cannot recognize -- Dillon is no longer good law because of vertical stare decisis. But where constitutional amendments overrule Supreme Court precedent, vertical stare decisis has no role to play. You know, I cite a poll tax case from 1964. That district court didn't wait for the Supreme Court to recognize that the poll tax amendment overruled precedent. And I don't think this Court has to wait for the Supreme Court to acknowledge that the 27th Amendment directly contradicts its holding that the 27th Amendment can't be ratified anymore. So those are all reasons why it -- oh, and then lastly is Coleman v. Miller, I guess.

THE COURT: Uh-huh.

MR. VALAME: It says that language, "We have held that congress may impose a reasonable time for ratification." Again, that's in the context of the 18th Amendment. So it's deadlines in the text. It had nothing to say about deadlines outside the text. There's a snippet in the opinion, I think, the D.C. District Court relied on that Coleman plurality said, "Deadline either in the text of the Amendment or in the proposing clause." And then the -- you know, the argument is that, oh, they said, "In the proposing clause," so that indicates it can be in the proposing clause.

So, first of all, no one had even considered in 1939

that it could be in the proposing clause. The 23rd Amendment was in 1960.

Second of all, that's a plurality holding of Coleman that did not have the assent of all the justices or even a majority of the justices. You know, the Supreme Court has said Coleman is limited to exactly one thing. That's a holding. And that is state legislature standing on a vote nullification theory. Every other part of Coleman is a plurality -- very fractured plurality. You know, Justice Scalia said it's hardly even a legitimate judicial decision the way that less than a majority of the Court issued a judgment. So I think this Court should not rely on such an opinion to rule that the Equal Rights Amendment is no longer valid.

So once we no longer consider Dillon, I think the textual argument is unbeatable. The one or the other mode of ratification says only one or the other mode. A deadline is not one of the modes, therefore there can be no deadline. I guess -- the government points to history. So the government says that congressional practice can liquidate the meaning of the Constitution if it's indeterminate.

Som first of all, the meaning of the Constitution is not indeterminate. The one or the other is as clear as it can be. And, you know, just because something has been done a long time, if it’s contrary (indiscernible) to the clear

text, then the text controls.

Second of all, the practice the government relies upon is 12 years of practice. Not 100 years, not 60 years, 12 years. From 1960 to 1972, Congress had deadlines in the proposing clauses. The next amendment proposed by Congress had a deadline in the text like the past amendments. So, you know, even the most capricious Supreme Court cases in the foreign policy arena have required 20, 30 years of consistent practice to liquidate the meaning. Twelve years in an arena of, you know, very important constitutional magnitude, not foreign policy where you have deference to the political branches. Twelve years is just not enough to liquidate anything.

And then, you know, there's the Stephen Sachs' article, which I cited in my motion for summary judgment. I just -- the Sachs' article concedes that for its analysis to have weight, you have to conclude the instructions in the 12th and 17th Amendments were legally binding guidance on the meaning of the amendments. But those instructions are clearly not. Those instructions are declaratory of what the amendments do. Both amendments are obviously implied repeals of prior parts of the Constitution. And, you know, what Sachs says is that, oh, the parts that the prefatory text specifically mentions are presumptively repealed. Every other part of the Constitution is presumptively not

repealed. But Sachs is just describing the (indiscernible) against implied repeal, which already applies to constitutional amendments.

So I think -- you know, you can just think about it this way, if that prefatory text didn't exist, is there any case in which the meaning of the amendments would come out differently? I can't imagine how the prefatory text would ever change the real-world application of those amendments. And I think that goes to show, you know, for 200 plus -- well, yeah, for like 180 years, no one thought the Constitution could be effectively changed by text in the prefatory clauses until 1960.

THE COURT: This is a question not just limited to your -- this contextualist argument. But big picture -- if you are right in your constitutional analysis --

MR. VALAME: Uh-huh.

THE COURT: -- and if I determine you have standing, it would seem that a lot of other people could make the same arguments in connection with the Selective Service registration requirements. But to my knowledge, no Court has gone your way on this.

So, first, historical question. Am I wrong about that? Is there some Court that has agreed with your constitutional analysis and has granted a plaintiff in your situation the relief that you seek?

MR. VALAME: So no Court has considered this question. So the answer is no. But, you know, again, if no Court has considered the question, it's hardly a surprise that I haven't had any favorable rulings for my position. So the two district court cases they cite, I think Taylor vs. El Centro and a prison case -- you know, I don't want to denigrate pro se plaintiffs, but those were obviously frivolous claims that were filed before the 20th Amendment even took effect. They were filed before the two-year grace period. I think, you know, saying from the one line footnotes, "20th Amendment is not an amendment" with no briefing or argument would not really be a way we do persuasive authority in the courts.

Second of all, Illinois vs. the Archivist. You know, clear and indisputable is the Mandamus standard. I think the Ninth Circuit has said clear error is -- hits you with all the force of a five-week-old rotten, dead -- unrefrigerated dead fish, and Mandamus is even higher than clear error. So the fact that the D.C. circuit said it's not clearly indisputably correct that the Equal Rights Amendment is ratified in a case where the states probably even lack standing should not be adverse precedent in this question where you're reviewing the issue denote.

THE COURT: Sorry. So you're -- in conclusion -- I'm not putting words in your mouth. This has not received

a rigorous analysis before by other Courts is your view?

MR. VALAME: Well, I don't want to say the analysis wasn't rigorous, but it -- no Court has reviewed the precise question before your Honor, which is, under a de novo standard of review, is the Equal Rights Amendment part of the Constitution of the United States?

THE COURT: And if I determine that you're right in your analysis and their arguments are wrong, and you have not filed -- this as a class action, you're -- the remedy you're seeking is as to you. But pragmatically, it would be a pretty wide-reaching remedy potentially.

So address the political question aspect of it and the big picture consequence if I were to go your way on your motion for summary judgment. What would be the practical consequence of that?

MR. VALAME: So I think there's kind of two distinct issues. There's the remedy question and there's the political question, doctrine. So I'll talk about political question first. The fact that it's about the draft in foreign policy doesn't make it a political question. My Fifth Amendment claims, for example, I don't even think the United States says those are political questions, and the Supreme Court decided them on the merits in 1980. So the fact that it's, you know, a draft, which I -- you know, it's a military thing. It has foreign policy

implications. I acknowledge that. That doesn't make it a political question.

So if we go to the deadline -- that's the first thing, deadline and state rescissions. The deadline is not a political question. I'm just asking the Court to undergo a normal textual analysis of the Constitution. Is there -- can Congress impose a deadline in the prefatory clause. And just like the Carey case in 2012, you know, that might touch on other branches -- it might disagree with the other branches. But there's no demonstrable textual commitment that Congress decides all questions with Article V. You know, maybe four justices in Coleman thought that, but that view has been rejected ever since.

THE COURT: Uh-huh.

MR. VALAME: I cite Justice Stevens in the 1970s talking about that. It's not a political question. The deadline just requires familiar application of constitutional tools.

So if there's no textually demonstrable commitment, the standards are judicially manageable. We're not asking the Court to say deadlines have to be reasonable. That might be unmanageable. We're saying no deadlines or yes deadlines. That's as manageable as it gets. Then there's the prudential factors of Baker vs. Carr. Congress hasn't spoken on the question. You're not disrespecting coordinate

branches. We don't have the enrolled bill rules. There's no unusual need for pressing adherence to a political decision already made. And, yeah, I don't think even the government makes the political question argument on the deadline.

So now, state rescissions. I think the Court can decide the political question like very easily, because the states that have rescinded the ratifications have all said expressly, "We do not believe the political question doctrine applies." So if all the states say, "Courts, please decide this question" -- that was in a brief with the D.C. circuit, by the way. They said that and the district court. So if the states say that, then there's no reason why the Court shouldn't. And even absent that concession, again, it's just the familiar application of constitutional factors. The Supreme Court has had similar questions with term limits, with, you know, faithless electors in 2020. Those were all state prerogatives that kind of presented a similar analytical question, and the Supreme Court decided them, I don't think even mentioning the political question doctrine. And I would note that the D.C. District Court's analysis also included discussion of political question. That Court found that there was no political question. But, again, the Mandamus standard is so high, the plaintiffs couldn't reach it, and the district also found they lack

standing. So that doesn't really apply in this case.

In terms of remedy -- so I'm asking for three remedies. So I think the government concedes that a declaratory judgment at absolute minimum as applied to me is appropriate. Injunctive relief as applied to me, I don't think the government has made a serious effort to show that my absence from the Selective Service would cause any irreparable harm. So if I prove my constitution rights were violated, that creates a presumption of harm, presumption of public interest, so an injunction should issue.

I think the biggest feud is over vacating regulations for the Selective Service. And I think, you know, defendants don't really grapple with the fact the Ninth Circuit has said the presumptive remedy for violation of the APA, which says, you know, constitutional rights are protected in administrative proceedings, is vacating the regulations. And they cite some dissenting opinion saying, vacatur might not be authorized by the APA or it's not appropriate. You know, I cite Justice Kavanaugh who says it is. Maybe the Supreme Court will decide that. But in the Ninth Circuit, vacatur is the presumptive remedy. And the Ninth Circuit has said it's only not presumptive -- I think I wrote this down here -- where the agency has -- where the agency is "capable of resolving the issue on remand without vacatur." That's Mont vs. Howland (phonetic). But the

Selective Service has said, "If you remand without vacatur, we're not going to reconsider the issue because we don't have any authority to do that." So remanding without vacatur would be futile. The only option for the Court is to do as the APA says and set aside the unlawful regulations.

And I acknowledge that will have maybe a large impact because the Selective Service won't be able to compel people to register until Congress acts. And I would say two things about it. First of all, if you vacate the regulations, I think it's virtually assured the vacatur will be stayed on appeal either by your Honor or the courts of appeal. So the impact won't be felt for some time. And I say -- you know, the Fifth Circuit has said that's a relevant consideration when deciding the --

THE COURT: It's irrelevant or relevant?

MR. VALAME: Relevant --

THE COURT: Relevant.

MR. VALAME: -- when deciding the equities.

Second of all, we're not at the preliminary injunction stage. If you determine that I'm right on my legal arguments, you're saying I have a 100-percent chance of success on the merits, which means for purposes of according the remedy, you don't have to consider the risk that you're wrong. Now, when you consider a stay pending appeal, that's

a different analysis, the four factor stay test. You might decide to stay your opinion or your order. But vacatur should be granted initially at least.

And you know, I do think the two-year grace period supports that -- the people already said Congress has two years to comply. I don't think this Court has the authority to change that interest balancing and say, "Well, Congress should have even more time, and we're not going to have any, like, enforceable compulsion on Congress." I don't think that's in accordance with the 20th Amendment's text.

Okay. What else do I have to say on this question? Stephen Sachs. Oh, the US says my arguments are circular on the deadline. I'll be honest, I don't really understand what the US means by that, but I'll just explain how my interpretation of Article V worked in practice.

So if Congress wants a deadline on an amendment, they would propose an amendment with the deadline in the text. Now, that deadline isn't legally operative when it's proposed. The only thing that's legally operative is the proposal itself, which is before the states and the mode of ratification. But when three-fourths of the states ratify that proposal, the deadline immediately becomes law. So let's say the deadline has expired, but states, you know, symbolically, maybe, ratify anyways, the amendment will become part of the Constitution, but then the deadline would

say, okay, I'm amending Article V, and the amendment no longer has legal effect.

So it's not circular. The amendment is still part of the Constitution. It just has no legal effect. And, you know, state governments are entitled to symbolically ratify amendments. Congress does symbolic gestures all the time. So I don't think that circularity is a reason to reject my position.

Let me see if there's anything else I have written down here. Oh, the Nash -- the Idaho case where the Supreme Court vacated it under Munsingwear. So the government doesn't answer my citation to Wisconsin Department of Revenue vs. Wrigley, which, you know, specifically says Munsingwear vacaturs aren't precedent. That makes sense. The whole point when the Supreme Court vacates a lower court decision under Munsingwear is they don't want anyone citing it for legal consequences. So I think it would be not respectful to the purpose of the Munsingwear vacatur to say, "Oh, maybe this is like a secret ruling that the amendment expired anyways." But even if you wanted to try to get the tea leaves from Idaho vs. Nashville Organization of Women, the Supreme Court would have vacated it on mootness grounds even if the amendment was still pending. Idaho's complaint in that case asked for an injunction and joining the administrator of general services from treating the deadline

extension as valid. Once the deadline extension expired, the request for relief in Idaho's complaint became moot. So even if the amendment was still pending in that specific case, mootness would still have been granted. Or the Supreme Court could have just thought that, you know, no state has ratified in the past three years. That means unlikely, regardless of the deadline or validity of the amendment. So there's no concrete ripe injury at the moment.

The point is we don't know why the Supreme Court vacated it. I can't even find a lot of the materials in that case in the public record. Maybe the government has them. But I don't, and I don't think the Court should speculate so much on what the Supreme Court did all those years ago.

Precedent. Oh, I think last thing I might have to say is, it's not the case that everyone accepted the deadline in the prefatory clause was valid when it was proposed. So, you know, I made a bit of a list here. So when in 1933 people first proposed to bring the deadline in the prefatory clause, Lamar Jeffers objected, Rep Ramseyer rejected -- objected to that.

The House report in 1978 says that nothing in Article V says provisions concerning the mode for ratification must be passed by two-thirds super majorities or that the deadlines

in amendments are part of the amendments themselves. In fact, the OLC report they relied upon says that, citing Rep Jeffers and Rep Ramseyer, the evidence is to the contrary that this prefatory deadline is valid. When Senator Calfer (phonetic) proposed the deadline in the prefatory text to the 23rd Amendment, Senator Russell stood up and said, "This is a departure from any draftsmanship I've ever seen with regards to constitutional amendments." And he was very dubious that this would have the same, you know, inoperative effect as the deadlines contained in the texts of prior amendments.

So I -- and then I also have this statement from 117 Congressional Record, 3584 from 1971, saying the deadline is merely a statute and isn't like a constitutional status. So it's like a smattering of statements.

THE COURT: And that was in the context of -- what was that in the context?

MR. VALAME: So the deadline as a statute is from the Equal Rights Amendment debates. It's from 1971 I have written here.

THE COURT: Got you.

MR. VALAME: I found it in a lot of the article from 1980. So it's like, yeah, bit of a historical searching. But I was able to find all these statements of doubt that the deadline was valid. So it's not the case

that, you know, I'm coming in 40 years later and unsettling everyone's expectations in order to get an amendment ratified.

THE COURT: You've done lots of digging. Well, different procedural topic. In a case alleging a constitutional violation, we rarely have a settlement conference in those cases because there's polarity -- yes, no, no, yes. There's not much gray area in between to say, well, we compromise by striking down half of the statute or by something like that. So we don't usually have a settlement conference. There's something unusual in your situation, and I don't need to dig too far into the facts, but at the beginning of our hearing today, you mentioned that you had applied to work for the government in a few different jobs. And I don't need to delve into whether you're qualified and what those positions are. And Mr. Rising has not evaluated those, and he doesn't know the answer to those right now either. But it occurs to me if -- that there may be -- you maybe have different objectives, and I don't know what all your objectives are. But in a settlement conference, which is a non-public proceeding, you can have a communication about those things to figure out on the plaintiff side what are your objectives, on the defense side what are your interests and objectives. And sometimes, there might be something that is not obvious to the Court as

to what might be a way to be a win-win solution or to give both parties something of what they're wishing that would be a good solution. I have no idea if that's possible. But it occurs to me because you've got some other things that were outside the pleadings, and there's some facts which I didn't know about until we got here, and the defense is hearing about for the first time. So this a case where there would be utility in a settlement conference to have you get together, you know, in a less formal setting without a record to explore and see if there's a compromise or my -- or is that not a good use of your time?

MR. VALAME: So I don't think that would be a good use of time. I didn't apply to the jobs to manufacture standing for this case. I'm actually applying for them, and I think, qualified. And I would appreciate if the government agreed not to enforce the regulations against me for the pendency of this litigation. But a settlement conference requires give and take on both sides, and I'm not sure what I would be able to offer the government in exchange for any concessions. The individual claims aren't for the Court, really, and they wouldn't help with the job applications anyways, and I wouldn't dismiss my complaint or alter it in order to get those jobs. If they deny me the jobs on this basis, I would probably come here and ask for an injunction, honestly. So I don't think a settlement

conference would be worthwhile because there's just nothing I can offer the government.

THE COURT: All right. Thank you. Think about that. I'll ask Mr. Rising the same question. It does take, as they say, two to tango. So I sometimes order people to have a conversation that doesn't compel a result, but just have a conversation, because sometimes there's an area of overlap that's not obvious to me that can become obvious once the parties are talking with each other directly. So I hope you keep an open mind to whether there is something less than taking us to the Supreme Court, which you know is a few hurdles away from where you're at right now. But it seems like you're well prepared for a long legal argument, and I appreciate your presentation.

Anything else you would like me to consider? Now, I will give you a chance to reply to them. But anything else you would like to tell me?

MR. VALAME: So do you want to hear argument on the state rescissions issue or --

THE COURT: I don't need to hear anything more because you've given me a lot of information already. But I'm giving you open floor if you -- if you've got more that you want to highlight for me.

MR. VALAME: Okay. I guess I just point the Court to my arguments and why implied power should be construed

narrowly. There's a lot of case law on that issue. Supreme Court has said it's only absolutely necessary powers and the fact that, you know, for the first 100 and something years, there were no deadlines at all kind of proves that it's not necessary for Congress. And that's especially true because this is Congress exercising power unilaterally and, according to the government, by bare majorities with no other checks. I don't think I have to repeat that all the way here, but it's an important consideration when evaluating the scope of congressional power.

I think that's all I have to say. My voice is going dead. So I'll let the government --

THE COURT: I've exhausted you. All right. Thank you very much for your presentation.

Mr. Rising. Thank you for waiting.

MR. RISING: Thank you, your Honor, may --

THE COURT: And just to be a hot bench, if I might jump in just on this settlement conference idea. And I'm putting you on the spot, because it was not something I prepared you for in advance, but what's your reaction to that concept?

MR. RISING: Of course. We're happy to discuss, but it's something that I would have to speak with my clients and the department first.

THE COURT: Yeah. On that, what I'll do for both

of you is to -- rather than spending more time on that topic now, after our hearing, go home and confer with your colleagues and think about it.

And, Mr. Valame, you don't have anyone to confer with, but think about it.

And I'll ask you each to file a kind of a case management response in a week's time just telling me what your views are. If you think it wouldn't be helpful, you can say that, or that you do think it would be productive, that that's what you think. And also timing. If you said, you know, you think it should be later or after the Court has decided this or sooner that -- you can give me that guidance too.

All right. So that's a little segue. But, Mr. Rising, there have been much discussed there. I'll give you open floor.

MR. RISING: Thank you, your Honor. So jumping straight to the Equal Rights Amendment piece, because I think plaintiff has pretty clearly conceded the Fifth Amendment claim is not a viable vehicle for him at this point. Much of plaintiff's argument focuses on making the case into something much harder than it really is. This is not a case where the government is asking the Court to say that Congress could compel ratification by 100-percent of states instead of three-quarters. This is not any of the

many harder cases that plaintiff addressed.

Instead, this is a case that involves Congress doing something it's done for hundreds of years. It's imposing a ratification deadline, which the Courts upheld in Dillon, which the Coleman Court found was a holding, and which most recently in D.C., the D.C. circuit just found was a permissible exercise of Congress' Article V power.

Plaintiff really depends on the distinction between deadlines in text versus deadlines in the prefatory clauses. This is really a distinction without a difference. Congress has been including legally operative language in prefatory clauses since the Bill of Rights. And that congressional history, that level of historic practice is not 12 years. That's hundreds of years.

In those first early amendments, Congress included the mode of ratification in there. That would be ratification by the Convention or ratification by the states, and then also instructions that the states could ratify any of the Bill of Rights or all of them. To hold that plaintiff's view applies and that a prefatory clause language is totally meaningless would be to invalidate all of that language in the Bill of Rights, which we've understood to be part of how those amendments were ratified since the beginning of this country. Going all the way forward until all of the most recently passed amendments, all amendments proposed in

modern history in fact have included legally operative language in prefatory text.

The Court in the D.C. circuit in Illinois vs. Ferriero really addressed this question head on. Plaintiffs there made the exact same argument. The Court rejected it pretty swiftly under the same reasoning. It's -- there's no basis to draw a distinction between the two. The Court in Dillon did not draw distinction between the two. The D.C circuit cited those cases and there would still be good law in support of its position. I understand we're on a Mandamus standard there, but the same reasoning applies in this case, your Honor. It's pretty clear from the government's perspective.

So as to the rescissions, your Honor, I don't think that's a question the Court needs to reach. The Court in the D.C. circuit didn't end up needing to reach the question when it considered the same issue. But we would add that it does provide a narrower hurdle for plaintiff's claims. The Court would not only have to find that the deadline was invalid, but then also find that actions of five states afterward are also invalid. This would be a pretty momentous step for the Court to take, and plaintiff doesn't offer any precedent in his favor on any of these points.

And then lastly as -- the vacatur. Plaintiff only asks for relief as to himself in the complaint. The complaint --

I believe it's paragraphs A, B, and C of the request for relief, "Ask for vacatur only insofar as these regulations impose legal obligations on the plaintiff," and then, "Ask for a declaratory judgment and injunction only insofar as regulations apply to plaintiff as well." I don't think based on what's in the complaint, we've got any grounds to give any broader relief in this case. But we don't contend that any relief is warranted here, because as every Court to have ever considered an ERA claim has found, it doesn't provide the basis to state a claim.

Do you have any questions, your Honor?

THE COURT: I do not.

MR. RISING: Thank you very much.

THE COURT: Thank you very much.

Mr. Valame, back to you.

MR. VALAME: Okay. So I guess the US first argues that prefatory clauses are distinction without a difference, which is very odd considering everyone agrees that what's in the prefatory clauses is not part of the Constitution, and the OLC has agreed that things that amend Article V that, you know, we might think would be a prefatory clause if it had legal effect must be in the content of amendments in order to amend the effects of Article V. So I don't think the United States' position can be squared with the constitutional reality that no one considers these clauses

part of the Constitution and that everyone agrees that some things have to amend Article V. I mean, the text of amendments.

The lack of precedent, you know, again, this is the first case that have presented the issue. The government can say there's no precedent, but that shouldn't factor very heavily into the Court's analysis. And I think especially this Court should not rely on Illinois vs. Ferriero very much in its decision. The D.C. circuit I think was very, very clear in every single piece of analysis that it did that it was under the clear indisputable standard. So, you know, when the D.C. circuit says, "We reject the claim that prefatory clauses and the texts are different," it says, "Under the clear indisputable standard," "Under the clear and indisputable standard." So I think it would be, you know, legal error for this Court to say -- to rely on the D.C. circuit as persuasive authority in that area, because the Mandamus standard is, again, sky high.

The Bill of Rights question really quick. So the argument made is that Congress said all or some of the proposed amendments can be ratified. That's -- A, it's not divorced from the content of amendments. All that Congress is doing with that is saying one amendment ends here and the next amendment starts here. That's clearly Congress' power to designate what the content of amendments is. Congress

was saying, "We're not proposing one long amendment with 12 articles. We're proposing one -- we're proposing 12 separate amendments." And that isn't having any legal -- the operative effect in the same way that, you know, the US says the Congress can nullify state ratification deadlines. They don't bring up the 12th and 17th Amendments.

And then lastly, I would say, you know, the US says I'm making this case a lot harder than it has to be because I'm bringing up all these farfetched hypotheticals. And I think the question you should ask is, under the United States' position, what stops these hypotheticals from happening? You know, what standard would a Court apply to say Congress can impose a seven-year deadline in order to make sure a ratification is contemporaneous, but can't impose a deadline or a requirement that, I don't know, the ratifying states can't be gerrymandered? The ratifying states have to consider it at two legislative sessions. Those all promote consideration, deliberation, and national uniformity. And there's no sound reason to distinguish the deadline analytically from all these things.

So, you know, the Court can't just say only deadlines are valid to be generous. It has to say Congress has a broad power by bare majorities they can very deeply control this amendment process that Article V expressly divide between Congress and the states and doesn't give Congress

sole and plenary power over.

Last thing, vacatur in my complaint. I did say vacate the regulations insofar as they impose obligations on plaintiffs. But my understanding is that vacating a regulation for one person vacates for everyone. That was in the statement of recent decision I gave to the Court with Justice Kavanaugh's statement. So, yes, you would apply -- you would vacate the regulation as applied to me, but you're operating on the regulation itself with that remedy. So the regulation would just be gone for everyone. And maybe I'll take out the language in my amended complaint if your Honor is okay with that.

THE COURT: Very good. All right. Thank you for your presentation. And that is a good example of if you were amending your complaint, that might be something that you addressed.

All right. I'll take the motion under submission with, of course, the permission that I already granted there for further briefing and potential amended complaint. I'm not compelling amended complaint. If you chose to file amended complaint, to present it by December 20th, and your feedback on settlement process also by the same date, and I will not be ruling until I have those further submissions. So don't be checking your mail every five minutes between now and then. And as to any of the procedural things that occur

after that, we'll have a chance to communicate. So I think that gives us next dates. Thank you very much for your presentations.

MR. VALAME: Can I say one thing?

THE COURT: Please. Yeah.

MR. VALAME: If you grant the government's motion, I think you mentioned this at the opening, the individual defendants -- I think the claims would clearly fail for the same reasons that you grant the government's motion on. And if you grant the motion -- my motion for summary judgment, then I would request -- I expect the government would immediately appeal. So those proceedings will be stayed. I just don't want to have the individual claims, like, kind of hanging over everyone's head.

THE COURT: I understand that you don't want them hanging out there. Everyone's -- you're enthusiastic to get onto appeal, but we've got a few steps to get to before then. But, yes, I did note that in the briefs and in your presentation that you're not hoping to have further proceedings in this court after the rulings on the pending motions. But we'll see.

Thank you very much. Have a great day.

MR. RISING: Thank you, your Honor.

MR. VALAME: Thank you.

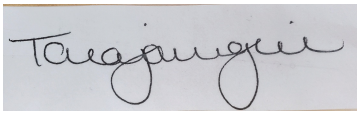
THE COURT: We're in recess.

(Proceedings adjourned at 12:33 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.



Echo Reporting, Inc., Transcriber

Monday, March 18, 2024